

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Implementation of Section 621(a)(1) of the Cable)	MB Docket No. 05-311
Communications Policy Act of 1984 as Amended)	
by the Cable Television Consumer Protection and)	
Competition Act of 1992)	

COMMENTS OF THE MANHATTAN COMMUNITY ACCESS CORPORATION
D/B/A MANHATTAN NEIGHBORHOOD NETWORK

Summary

The Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network (“MNN”), by its undersigned attorneys, files these comments on the Commission’s *Second Further Notice* in the above-captioned proceeding.¹ MNN and a multitude of other community media centers provide vital video programming that informs, protects, entertains, and enriches the lives of cable TV subscribers throughout the United States. A thriving market for diverse video programming – including public access programming – to American cable subscribers has been a central public interest objective of Congress and this Commission for decades.

MNN urges the Commission to uphold those statutory and public interest objectives so that cable subscribers can continue to receive access to public, educational and government

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, Second Further Notice of Proposed Rulemaking*, MB Docket No. 05-311, FCC 18-131 (rel. September 25, 2018) (“*Second Further Notice*”).

(“PEG”) programming. Several of the tentative conclusions of the *Second Further Notice*, however, misinterpret the relevant statutory provisions and public interest objectives in a manner that would threaten the financial viability of both municipalities and public access centers to offer PEG programming to cable subscribers throughout the United States.

Discussion

I. MNN and Other Public Access Providers Deliver Valuable and Diverse Video Programming to U.S. Cable TV Subscribers.

MNN is a non-profit corporation formed 28 years ago to operate the public access channels in Manhattan. It has grown to become the largest cablecaster of original video programming (commercial or non-commercial) in the United States. It is independent from, and not owned or controlled by, the City of New York. Further, the City has no editorial control or input over the video programming offered on MNN’s public access channels or the enforcement of MNN’s rules and regulations in the operations of the public access centers.

MNN’s vision is to empower local voices and diverse views of New Yorkers from all political, socioeconomic, and cultural perspectives. It achieves this by offering media distribution services, video production facilities, and media education to Manhattan residents and community-based organizations in order to deliver high-quality and hyper-local programming to Manhattan’s cable subscribers. MNN currently manages seven community access cable TV channels on the Spectrum and Verizon FiOS cable systems, and four community access channels on the RCN cable system in Manhattan, reaching more than 600,000 cable subscribers.

MNN collaborates with many other video content providers to offer informative and high-quality programming on its public access TV channels. For example, MNN partners with the independent media network Free Speech TV (FSTV) to deliver Manhattan cable subscribers

a variety of current affairs programming, special event coverage, health education programming, and independently produced documentaries.² On its NYXT channel, MNN works with more than ninety (90) content partners in Manhattan, such as: Alvin Ailey American Dance Theater; Big Brothers Big Sisters of New York City; Children's Museum of the Arts; Harlem Arts Festival; Louis Armstrong House Museum; Lower Eastside Girls Club; Manhattan Sideways; Museum of the City of New York; National Alliance on Mental Illness – New York City Metro; New York Restoration Project; and the New York Anti-Trafficking Network.³ These and other non-profit organizations and many individual voices could not afford to purchase program time on other channels or media outlets. But for the MNN public access channels, Manhattan's cable subscribers would have no access this unique local programming on commercial cable TV channels.⁴

The MNN channels also deliver original programming for Manhattan's cable subscribers. To do so, MNN invests in training residents and local community organizations in all aspects of video production and provides low-cost access to production equipment and facilities. MNN educates more than 1,200 media students annually in courses ranging from digital editing to field camera to studio production.⁵ Through significant upgrades and investments in its equipment and

² MNN-FSTV is available on the Spectrum (channel 1301) and FiOS (channel 39) cable networks in Manhattan.

³ For a complete list of the content providers on the NYXT channel, see: <https://www.nyxt.nyc/partners/?page=1>.

⁴ For Manhattan residents who are physically challenged or lack the financial means, this programming gives them the opportunity to enjoy the exceptional live music, arts, and performance works of New York City.

⁵ In the first half of 2018 alone, MNN saw 778 enrollments in its media classes of students from some of the poorest areas of the state, located in Upper Manhattan. Located in those communities, the MNN El Barrio Firehouse offers three television studios, editing suites and classroom spaces, and a three-camera television studio.

facilities in 2012-2013, the MNN HD Channel also offers cable subscribers original high-definition TV programming. These investments in the community are yielding great returns – for example, seven of MNN’s Youth Media Center programs won awards at the 2018 Hometown Media Awards sponsored by the Alliance for Community Media.⁶ Many of the MNN video producers are from minority, ethnic, and religious groups who are underrepresented in today’s commercial video programming marketplace. Their programming gives voice to diverse perspectives that are lacking on today’s mainstream cable TV channels.

MNN is just one among many public access organizations throughout the United States – including CAN TV in Chicago,⁷ the Boston Neighborhood Network,⁸ Philly Cam in Philadelphia,⁹ and many others -- producing high-quality local programming for cable TV subscribers. The public access programming of these organizations is of substantial value to cable TV subscribers and greatly enhances the value of the cable operators’ TV channel line-up.

II. The Costs of PEG Obligations Are Not Franchise Fees

Nowhere in the Communications Act did Congress expressly provide that the cable operator’s costs of meeting PEG obligations are “franchise fees.” While the *Second Further Notice* (§§ 19-20) proposes to interpret the statutory definition of “franchise fee” to include all PEG costs, this is mistaken for several reasons. First, as the *Second Further Notice* (§ 21)

⁶ See, <https://www.mnn.org/news/youth-channel-slays-hometown-media-awards>.

⁷ See, <https://cantv.org/>.

⁸ See, <https://bnntv.org/>.

⁹ See, <https://phillycam.org/>.

explained, not “all costs related to franchise requirements” are franchise fees.¹⁰ One example of such cable-related franchise costs, the Commission noted, is build out obligations because they “are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit to the cable operator.” *Id.* MNN agrees wholeheartedly regarding build out obligations and, for the same reasons, the costs of PEG obligations are not franchise fees. PEG programming is “part of the provision of cable service” as it is offered to cable TV subscribers on the cable operators’ standard video channel line-up. Further, as discussed in Section I above, PEG access channels provide unique, high-quality, and valuable programming to cable TV subscribers, which enhances the value and profitability of the cable operator’s service offering to its customers.

Moreover, a PEG obligation does not meet the statutory definition of a “franchise fee” because it is not a “tax, fee, or assessment”¹¹ While the local franchising authority may require PEG access as a franchise condition, the cable operator receives PEG programming that enhances the operator’s cable TV channel line-up. Thus, a PEG obligation is of a completely different nature from an obligation of the cable operator to provide money or services in which it receives nothing of value in return, such as an obligation to provide free cable TV service to city offices. In fact, the FCC, state and local authorities, and other regulators acting pursuant to their legal authority often require an exchange of value -- money or services -- between two parties and set the rates, terms or conditions of that exchange, but those requirements do not amount to a tax, fee, or assessment. The same is true when a local franchising authority exercises its statutory

¹⁰ The Sixth Circuit reached the same conclusion: “[t]hat the term ‘franchise fee’ can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them.” *Montgomery County, MD v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017) (emphasis in original).

¹¹ The Communications Act defines as “franchise fee” as “any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.” 47 U.S.C. § 542(g)(1).

authority under the Communications Act, 47 U.S.C. §542(a)(4)(B), to require PEG access. Nor does the City of New York dictate the amount of fees to be paid by the franchisees to MNN. Those are the product of direct, individual negotiations between the access centers and each franchisee.

Finally, the *Second Further Notice* also misinterprets the statutory definition of “franchise fee” by failing to consider the term in the context of the statute as a whole, and by not reconciling its cramped interpretation with the express Congressional policy to promote diversity through PEG programming. The “franchise fee” definition was adopted by Congress in the Cable Communications Policy Act of 1984, which also established a national policy “to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.” 47 U.S.C. § 532(a). The legislative history confirms that Congress intended “to assure that the cable systems provide the widest possible diversity of information services and sources to the public Local governments, school systems, and community groups, for instance, will have ample opportunity to reach the public under 4103's grant of authority to cities to require public, educational, and governmental (PEG) access channels.”¹² The Commission has also recognized that PEG access “promotes important statutory and public policy goals.”¹³ PEG video programming is the epitome of diversity on the cable TV channel line-up, attending to the local cultures, groups, and topics that commercial mainstream media outlets do not. In this same vein, MNN operates multiple public access channels and the City has additional channels for government and educational access. Determining the value of these channels will likely be

¹² H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

¹³ *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101, 5151 (2007).

challenging to agree on and could well spawn years of significant litigation. Whether this is the intent or the byproduct of the *Second Further Notice*, the result is destructive to the public interest, the primary touchstone of the Communications Act, with no offsetting benefit other than to increase the cash profits of franchisees.

The *Second Further Notice*, however, focuses its statutory interpretation almost exclusively on just a portion of the “franchise fee” definition, giving overwhelming weight to the single word “any,” while largely ignoring other important statutory provisions and Congressional priorities. This is error because “[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole.” *United States v. Morton*, 467 U.S. 822, 828 (1984). The *Second Further Notice* fails to “interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ ... and ‘fit, if possible, all parts into an harmonious whole.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The *Second Further Notice* also ignores that Congress separated franchise fee costs from the cost of PEG obligations for purposes of itemization on cable subscriber bill in the very same section defining “franchise fee.” Section 622(c) of the Act permits cable operators to establish a separate line item on the subscriber’s bill for:

“(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid. [and]

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.”

47 U.S.C. § 542(c)(1) & (2). The proposed interpretation of the *Second Further Notice* that a PEG obligation cost falls wholly within the statutory definition of “franchise fee,” however, would ignore Congress’ decision to treat those two costs separately. *TRW Inc. v. Andrews*, 534

U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (*quoting Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Conclusion

For the reasons stated above, MNN urges the Commission to find that the costs of PEG obligations are not included in the “franchise fee” five-percent cap.

Respectfully submitted,



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